Before the
Federal Communications Commission
Washington, D.C. 20554

In the Manner of Communications Assistance for Law Enforcement Act and Broadband and Access Services	ET Docket No. 04-295 RM 10865

REPLY COMMENTS OF VERIZON ON THE COMMISSION'S FURTHER NOTICE OF PROPOSED RULEMAKING

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INTRODUCTION

The Commission should act on five key points in this CALEA rulemaking docket. First, regardless of whether the Commission decides that providers of one-way VoIP services are or are not exempt from CALEA, the Commission should recognize that the underlying broadband access provider will not have reasonable access to higher layer information and applications and would not be able to reasonably isolate, identify, or filter packets. Accordingly, under either scenario, the Commission cannot impose an obligation to satisfy CALEA with respect to these services on the underlying broadband access provider. Second, the Commission should clarify that providers of private networks do not forfeit their CALEA exemptions if such networks also have the capability to connect with the Public Switched Telephone Network ("PSTN") or the public Internet. The Commission should clarify that its previous *CALEA Applicability Order*[1] means instead that such providers may be subject to CALEA when they actually *do* connect to the PSTN at the technical demarcation point between private and public networks. Third,

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[1] *Communications Assistance for Law Enforcement Act and Broadband and Access Services*, 20 FCC Rcd 14989 (2005) ("*CALEA Applicability Order*").

CALEA already contains comprehensive exemption procedures available to all providers, including small and rural carriers and educational institutions, and therefore the Commission need not create new exemption mechanisms. The limited record in this docket is inadequate to consider commenters' requests for exemption by rule. Fourth, the Commission is required to make an independent decision on any CALEA exemption requests that may be filed. While the Commission obviously should consult with the Justice Department and carefully consider its views, the Commission cannot accord the Justice Department's views on exemption petitions greater weight than the "consultation" standard specified in CALEA. Finally, the Commission should reject requests to establish a fund similar to the Universal Service Fund to cover CALEA costs in this docket. The Commission should permit carriers to recover their own CALEA costs in any reasonable manner and need not establish a new tax on telecommunications services.

I. REGARDLESS OF HOW THE COMMISSION CLASSIFIES ONE-WAY INTERCONNECTED VOIP SERVICE PROVIDERS FOR CALEA, BROADBAND ACCESS PROVIDERS SHOULD NOT BE SUBJECT TO CALEA OBLIGATIONS ABOVE LAYER 2.

Regardless of how the Commission classifies one-way interconnected VoIP service providers for CALEA, the Commission should not require broadband access providers to deliver packet information above layer 2 in connection with electronic communications originating from or terminating to one-way interconnected VoIP services.

The Justice Department has argued that "interconnected" VoIP service means the ability to make calls to *or* receive calls from the PSTN on the theory that connecting with the PSTN in either direction should be sufficient to subject such services to CALEA. DOJ Comments at 4-7. Other commenters disagree, arguing that "the fundamental attribute of two-way interconnectivity with the PSTN" is what makes interconnected VoIP service a "substantial replacement" for the PSTN. Skype Comments at 8. Regardless of how the Commission resolves this question, it

cannot impose the obligation to satisfy CALEA with respect to those services on the broadband access providers. As a practical matter, this means that broadband access providers cannot reasonably be expected to deliver packet information above layer 2. *See* Verizon Comments on CALEA NPRM at 12 (Nov. 8, 2004). This is consistent with Verizon's experience as the broadband access transport provider when the subscriber does not have Verizon as the Internet service provider. *Id.* In such instances, Verizon as broadband access provider does not typically isolate, identify, or filter information above layer 2. *Id.* For these reasons, if the Commission decides to exempt one-way interconnected VoIP service from CALEA, the Commission should not require broadband access providers to deliver information above layer 2.

II. PROVIDERS OF PRIVATE NETWORKS WITH OFF-NET CAPABILITY SHOULD BE SUBJECT TO CALEA ONLY AT THE DEMARCATION POINT BETWEEN ON-NET AND OFF-NET TRAFFIC.

The Commission should clarify that, for private networks with both on-net and off-net (i.e., PSTN and Internet) capabilities, CALEA attaches at the demarcation point between those capabilities, where the private network operator hands off traffic to or picks up traffic from the PSTN or public Internet from the broadband Internet access provider. As described in Verizon's opening comments, the broadband access provider may have limited ability to provide relevant information to law enforcement, *e.g.*, it may not be able to isolate traffic attributable to a single user, and the broadband access provider should not be required to provide information that is not reasonably available to it.[2] Verizon Comments at 5-7.

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[2] An example is a coffee shop that has a wi-fi "hot spot" for its patrons. *See CALEA Applicability Order* ¶ 36 & n.100. The "customer or subscriber" for purposes of CALEA section 103 is the coffee shop itself, not any of its patrons, because the broadband access service provider has a commercial relationship with the coffee shop only, not its patrons, and because of the nature of wi-fi service itself, which allows multiple, unknown users to use the same IP address at the same time.

In the *CALEA Applicability Order*, the Commission stated in a footnote that, "to the extent . . . that [such] private networks are interconnected with a public network, either the PSTN or the Internet, providers of the facilities that *support* the connection of the private network to a public network are subject to CALEA. . . ." *CALEA Applicability Order* ¶ 36 n.100 (emphasis added). As several commenters have noted, the term "support" in this footnote is subject to differing interpretations. Higher Education Coalition Comments at 5; TIA Comments at 4. Theoretically, all equipment and facilities in a private network may "support" all of its traffic, including traffic that is bound for or comes from the PSTN or public Internet. Indeed, in many private networks, all packets, whether on-net or off-net, transit the same facilities and cabling while traversing the private network, regardless of whether they ultimately are going to or coming from a public network. The Commission should therefore clarify that facilities that route or manage such off-net traffic are subject to CALEA only to the extent that they are located at the demarcation point between the private network and the broadband Internet access provider. These facilities may or may not belong to the private network operator. But the issue is not who owns or leases such facilities, but rather whether those facilities in fact provide direct access to public networks and manage such off-net traffic.

To conclude otherwise and subject private networks with off-net capability to CALEA, as footnote 100 could be misread to suggest, contradicts the express language of CALEA and would eviscerate the private network exemption in section 103(b)(2)(B). Congress specifically exempted the "equipment, facilities, or services that support the transport or switching of communications for private networks." 47 U.S.C. § 1002(b)(2)(B). The Commission could not have meant to effectively negate Congress' intent by declaring that all private networks with facilities that "support" off-net capability are now subject to CALEA.

In addition to the adverse effect on educational institutions noted by some commenters, *see e.g.*, Higher Education Coalition Comments at 5-6, such a reading of CALEA's obligations would have serious consequences for companies such as Verizon that provide and manage private networks on a commercial basis. Private networks have been designed, built, managed, and priced in part based on the plain language of CALEA, which unequivocally grants private networks an unqualified exemption from CALEA. In addition, many U.S. corporations have installed their own dedicated Intranet infrastructures for corporate internal use. While some private networks have off-net capabilities, that off-net traffic is managed at discrete access points such as edge routers and media gateways that send and receive off-net traffic as it transits between private and public networks. The *CALEA Applicability Order* must mean that CALEA attaches to providers of such equipment at these access or demarcation points, whether or not they are owned by the private network provider. It could not have meant to suggest that the presence of such equipment connected to a private network with its attendant off-net capability obviates the private network exception and subjects the entire private network to CALEA. The Commission should clarify that the private network exception applies whether or not private networks have off-net capabilities and that CALEA attaches to providers of facilities that manage off-net traffic at the point of demarcation between private and public networks.

III. ANY REQUESTS FOR EXEMPTION UNDER CALEA CAN BE CONSIDERED UNDER SECTION 109.

As Verizon has previously explained, the Commission need not exempt entire classes of providers from CALEA or develop a set of relaxed standards for certain providers. Verizon Comments at 7. *See also* Center for Democracy & Technology Request for Stay at 8 (Nov. 23, 2005) (referring to such relaxed standards as "CALEA lite"); Texas ISP Ass'n Pet. for Reconsideration at 8 (Nov. 22, 2005) (same). The statute already contains provisions that permit

the Commission to determine that compliance with CALEA is not "reasonably achievable." *CALEA Applicability Order* ¶¶ 49-52; Verizon Comments at 7. Flat exemptions and relaxed standards do not serve the public interest because they encourage criminals to migrate to particular types of carriers that are insulated from CALEA.

Several educational institutions and associations, as well as some smaller and rural carriers, argued in their comments for exemption by rule. *E.g.*, Higher Education Coalition Comments at 14; University of Calif. Comments at 3; OPASTCO Comments at 2; ALA/ARL Comments at 9. But to the extent that these or any other providers seek an exemption from CALEA, section 109 of CALEA gives the Commission the power to determine whether compliance with the assistance capability requirements is "reasonably achievable with respect to any equipment, facility, or service installed or deployed after January 1, 1995." 47 U.S.C. § 1008(b)(1). Section 109 sets forth factors for the Commission to consider in making that determination, including public safety and national security, compliance methods, equipment cost, development of new technologies, and financial resources. None of the commenters asking the Commission for an exemption by rule has explained why an exemption is warranted under those factors. Accordingly, rather than grant exemptions by rule on the limited record here, any requests from educational institutions or carriers for such exemptions should be addressed in the context of section 109 petitions.

IV. THE COMMISSION MUST MAKE AN INDEPENDENT DECISION ON ANY CALEA EXEMPTION PETITIONS AND MAY NOT SUB-DELEGATE THAT RESPONSIBILITY TO ANOTHER AGENCY.

While the Commission obviously should consult with and carefully consider the views of the Justice Department with respect to any exemption requests that may be filed, the Commission cannot accord the Justice Department's views on such requests greater weight than

the "consultation" standard specified by Congress in section 102(8)(C)(ii). DOJ Comments at 19. Any such sub-delegation of the Commission's statutory authority is contrary to the plain language of CALEA and Congress' intent.

Section 102(8)(C)(ii) authorizes the Commission to exempt by rule any class or category of telecommunications carriers "after consultation with the Attorney General." 47 U.S.C. § 1001(8)(C)(ii). In the *CALEA Applicability Order*, the Commission sought comment on "what procedures, if any, the Commission should adopt for exempting entities under section 102(8)(C)(ii)" and how to interpret the "consultation" requirement. *CALEA Applicability Order* ¶ 50. The requirement to consult with the Justice Department appears elsewhere in CALEA, including extension requests under section 107(c)(2), industry standard-setting under section 107(a)(1), and cost control regulations under section 109(e)(2). In addition, section 106(a) requires telecommunications carriers to "consult with" equipment manufacturers and vendors about CALEA compliance.

In its comments, the Justice Department argued that "consultation" under section 102 of CALEA is broader and more expansive than consultation under section 271 of the Communications Act of 1996. DOJ Comments at 15-16. On CALEA exemptions, it argues that the Commission should "defer[]" to the Justice Department's "unique expertise." *Id.* at 15, 19. A model of such deference, according to the Justice Department, is the Commission's *Foreign Participation Order*,[3] which identifies factors the Commission will consider in reviewing applications for foreign participation in the U.S. telecommunications market. DOJ Comments at 19.

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[3] *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd 23891 (1997) ("*Foreign Participation Order*").

While the Justice Department's views should be carefully considered, according the Department a greater role than the "consultation" role assigned by Congress would be contrary to the plain language of CALEA. The Justice Department correctly notes that the consultation requirement is satisfied by Commission "consideration" of the Attorney General's comments. DOJ Comments at 16. But Congress assigned decision-making authority to the Commission; therefore, it is the Commission that must make an independent decision after considering all relevant points of view. And only Congress may expand or change the statutory consultation standard set forth in section 102(8)(C)(ii) of CALEA.

The Justice Department argues that, while consultation may have been appropriate in evaluating section 271 applications, it is not appropriate in evaluating CALEA exemption petitions. *Id.* According to the Justice Department, it and the FCC are co-equal agencies that "share" expertise on the economic, market, and competitive issues raised in section 271 applications, but the issues raised in CALEA petitions "fall largely with the unique expertise of the Attorney General." *Id.* This distinction is based on a misreading of CALEA.

While the Justice Department's expertise in law enforcement is unquestioned, Congress did not design CALEA to serve only the needs of law enforcement. Indeed, Congress designed CALEA as a careful balance of three important interests – market competition and technology development (47 U.S.C. § 1002(b)), consumer privacy (*id.* § 1002(a)(4)), and law enforcement (*id.* § 1002(a)(1)). *See* H.R. Rep. No. 103-827 at 13 (1994) (stating that CALEA was designed "to balance three key policies: (1) to preserve a narrowly focused capability for law enforcement agencies to carry out properly authorized intercepts; (2) to protect privacy in the face of increasingly powerful and personally revealing technologies; and (3) to avoid impeding the development of new communications services and technologies"). Indeed, on some of these

factors, it is the Commission, not the Justice Department, that is the expert agency. In short, while the Justice Department has expertise on law enforcement issues, the interests of law enforcement are only one consideration in evaluating a CALEA exemption petition. And Congress tasked this Commission with the job of balancing all interests, including but not limited to law enforcement's, before deciding whether to grant an exemption from CALEA.

The Justice Department's reliance on the *Foreign Participation Order* as support for a more expansive standard than "consultation" is misplaced. That Order stands for the proposition that, in analyzing section 214 and 310(b)(4) applications from World Trade Organization members to participate in the U.S. telecommunications market, the Commission will consider national security, law enforcement, and foreign and trade policy concerns to be "relevant" factors under the public interest prong of a multi-pronged competitive analysis. *Foreign Participation Order* ¶ 61. And, in considering the public interest prong, the Commission will "accord deference" to the Executive Branch agencies "in identifying and interpreting issues of concern related to national security, law enforcement, and foreign policy that are relevant to an application pending before [the Commission]." *Id.* ¶ 63.

But "according deference" on foreign policy concerns under one prong of a broader competitive analysis is far from deferring on the ultimate question of whether section 214 and 310(b)(4) applications themselves should be granted or denied. In fact, the Commission made exactly that point, expressly limiting the Justice Department's role to an advisory one: "Similarly, we note that the Executive Branch, during the last two years, has never informed us that a foreign policy concern dictated that a Section 214 or 310(b)(4) application be denied. *We expect this pattern to continue*, such that the circumstances in which the Executive Branch would advise us that a pending matter affects national security, law enforcement, or obligations arising

from international agreements to which the United States is a party will be *quite rare*." *Id.* (emphasis added). The Commission concluded by "emphasiz[ing] that [it] will make an *independent decision* on applications to be considered and will evaluate concerns raised by the Executive Branch agencies *in light of all the issues raised (and comments in response) in the context of a particular application*." *Id.* ¶ 66 (emphasis added). In short, the *Foreign Participation Order* does not support the assertion that the Commission should "defer[]" to the Justice Department on whether CALEA section 102(8)(C)(ii) exemptions should be granted or denied. DOJ Comments at 19.

Nor could the Commission lawfully abdicate responsibility for making an independent decision on a matter squarely assigned to it by Congress. As the D.C. Circuit has found in another context, when Congress directs the Commission to make a particular determination, it is the Commission that must do so, and it may not effectively assign that decision to a separate governmental agency. *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004) (citations omitted).

In short, nothing in the text of CALEA, its legislative history, or the Commission's *Foreign Participation Order* suggests that the Commission may expand or alter the "consultation" role that Congress assigned to the Justice Department. To be sure, the Commission has some discretion to interpret the consultation requirement in light of the record in this docket and public policy, and the Commission may conclude that the views of the Justice Department are entitled to "substantial weight." 47 U.S.C. § 271(d)(2)(A). But such weight does not mean that the Justice Department's opinions on section 102(8)(C)(ii) exemption requests should have "preclusive effect," *id.*, or that the Commission should "defer[]" the Justice Department's opinion on the ultimate question of whether a request should be granted, DOJ

Comments at 19. In no event may the Commission delegate its role as the final arbiter of section 102(8)(C)(ii) CALEA exemption requests to the Justice Department or any other entity.

V. ESTABLISHING A USF-TYPE FUND FOR CALEA COSTS SHOULD BE CONSIDERED IN AN ACTIVE USF PROCEEDING, IF AT ALL.

The Commission should also reject one commenter's request that the Commission establish "universal service type funding" in this CALEA rulemaking docket. Subsentio Comments at 5. Subsentio proposes a "nationwide tax of $.01/per subscriber/month" to recover CALEA's costs for rural carriers. *Id.* at 6. As an initial matter, the recovery of CALEA costs was not among the issues on which the Commission sought public notice and comment. *CALEA Applicability Order* ¶¶ 48-52. The Commission stated that it would consider cost issues in its anticipated follow up order to the *CALEA Applicability Order*. *Id.* ¶ 3. In addition, as Verizon has previously stated, carriers should have the flexibility to recover their own CALEA costs in any reasonable manner. Verizon Comments on CALEA NPRM at 26-27. There is no need for the Commission to establish a new tax for the recovery of CALEA costs.

CONCLUSION

For the foregoing reasons, the Commission should recognize that the underlying broadband access provider will not have reasonable access to packet information and applications above layer 2 and would not be able to reasonably isolate, identify, or filter packets, regardless of whether the Commission decides that providers of one-way VoIP services are or are not exempt from CALEA. Second, the Commission should clarify that providers of private networks do not forfeit their CALEA exemptions if such networks also have the capability to connect with the PSTN or the public Internet. Third, CALEA already contains comprehensive exemption procedures available to all providers, including small and rural carriers and educational institutions, and therefore the Commission need not create new exemption

mechanisms. Fourth, the Commission is required to make an independent decision on any CALEA exemption requests that may be filed and cannot accord the Justice Department's views greater weight than the "consultation" role specified in the statute. Finally, the Commission should reject requests to establish a USF-like fund to cover CALEA costs in this docket and should permit providers to recover their own CALEA costs in any reasonable manner.

Respectfully submitted,

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